BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA K. HARBAUGH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,005
NATIONAL GYPSUM COMPANY	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 7, 2005 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment with respondent on the dates alleged?

2. Did claimant provide respondent with timely notice of accident?

3. Respondent contends that the temporary total disability compensation, if payable, should not begin until September 26, 2005, when claimant received restrictions from Michael H. Munhall, M.D. Therefore, did the Administrative Law Judge (ALJ) exceed her jurisdiction in ordering temporary total disability compensation prior to the receipt of the restrictions from Dr. Munhall?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant began working for respondent on June 21 or 22, 2005, as a forklift driver. Claimant's duties as a forklift driver required that she climb on and off a forklift between 100 and 290 times per day. Claimant testified that within a couple of days, her left knee began bothering her. Claimant had experienced prior problems with her left knee, undergoing arthroscopic surgery on June 20, 2001. Claimant testified that after the surgery, she returned to her work as a truck driver and had no problems with that knee.

Claimant testified that she told her foreman, Max Shippy, and the foremen's foreman, Bob Larson, of her ongoing knee problems and the fact that they were connected to her work duties with the forklift. Claimant was taken off the forklift job and moved to a light-duty job for one day, called the panel. After that, claimant was moved to a job called wet end leader, which required that she push 6,000-pound rolls of paper around. Claimant testified that on approximately July 26, 2005, while pushing a roll of paper, her back popped between her shoulder blades. This caused her problems and she advised Jeff Fowler, the person training her, of the problem. She also advised Nick Burns, a representative of respondent, of her problems. Claimant testified that her back popped on two other occasions while employed with respondent, with the last day alleged being August 20, 2005. Claimant testified that she told Max Shippy of her ongoing back problems while employed with respondent.

On August 22, 2005, claimant was provided information from Dr. Meador, the company doctor, that she had a torn meniscus in her knee. When she advised Mr. Burns of the knee problem, Mr. Burns said that it was an old problem and workers compensation would not pay for it. Mr. Burns also advised claimant that they no longer needed her services, and claimant was terminated on August 22, 2005.

Claimant's history is significant in that she did have preexisting knee and back problems. Claimant underwent chiropractic care with William D. Estes, D.C., at Pratt Chiropractic Center, P.A., on several occasions in both 2003 and in 2005. Respondent contends that both claimant's knee and back injuries are preexisting conditions for which respondent should not be liable.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[1]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[2] It is acknowledged that workers compensation is not intended

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[1] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[2] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

to provide compensation for debilitating medical conditions not created or exacerbated by work-related accidents or conditions.[3]

In this instance, it is acknowledged that to some degree, both claimant's knee and back conditions preexisted her employment with respondent. However, claimant's testimony is uncontradicted that her work activities with respondent aggravated those preexisting conditions. A claimant's testimony alone may be sufficient evidence of his or her own physical condition.[4]

Claimant was referred by her attorney to Michael H. Munhall, M.D., board certified in physical medicine and rehabilitation, for an examination on September 26, 2005. Dr. Munhall examined both claimant's back and left knee and determined within a reasonable degree of medical probability that there was a causal relationship between claimant's left knee and back injuries and claimant's employment with respondent. This evidence is also uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[5]

Respondent contends that claimant has failed to provide timely notice pursuant to K.S.A. 44-520. That statute requires that notice of an accident be provided to an employer within ten days after the date of the accident. In this instance, claimant has testified to telling her foremen (Mr. Shippy and Mr. Larson) and Mr. Burns of her knee and back problems. In addition, claimant's attorney provided a certified letter to respondent dated August 31, 2005, with a return receipt showing a delivery date of September 1, 2005. Claimant's alleged dates of accident are August 20 and August 21, 2005, and both dates fall within ten days of the receipt of that letter. This, coupled with claimant's testimony that she advised several of her foremen of her ongoing knee and back problems, clearly shows that claimant provided timely notice of accident. Respondent's appeal on this issue verges on frivolous. The Board, therefore, finds that claimant did provide timely notice of accident, having satisfied the requirements of K.S.A. 44-520.

Finally, respondent argues in its brief that the temporary total disability compensation should not start until the time that Dr. Munhall provided his restrictions in the September 26, 2005 report. Not every alleged error in law or fact is reviewable from a

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[3] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[4] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[5] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[6]

Additionally, the Board may review those preliminary orders where it is alleged that a judge has exceeded his or her jurisdiction or authority in granting or denying the benefits claimed.[7]

Claimant's entitlement to temporary total disability compensation is not an issue over which the Board takes jurisdiction on appeal from preliminary hearing orders. The ALJ did not, therefore, exceed her jurisdiction in ordering the temporary total disability compensation on the dates ordered.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 7, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[6] K.S.A. 44-534a(a)(2).

[7] K.S.A. 2004 Supp. 44-551.